IAC-BH-PMP-V2

**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/10809/2019**

**THE IMMIGRATION ACTS**

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| **Heard at Bradford IAC** | **Decision & Reasons Promulgated** |
| **On the 24 September 2021** | **On the 09 November 2021** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**TK**
**(ANONYMITY DIRECTION MADE)**

Appellant

**AND**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Cleghorn, Counsel instructed on behalf of TK by direct access.
For the Respondent: Mr Diwnycz, Senior Presenting Officer

**DECISION AND REASONS**

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who dismissed his appeal on protection and human rights grounds.

*Anonymity:*

2. The FtT did not make an anonymity order. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 24 September 2021. The appellant attended the hearing in person as did a court interpreter who was able to translate the proceedings for the appellant and so that he could hear the submissions of the advocates.

Background:

4. The appellant's immigration history and background is summarised in the decision of the FtTJ and the decision letter of the 11 October 2019.

5. The appellant is a national of Afghanistan. He claims to have arrived in the United Kingdom in 2002 – 2003. On 3 November 2006 the appellant was arrested and served with an IS151A as an illegal entrant. The appellant made a claim for asylum on 3 November 2016 which was refused on 14 December 2006. He appealed against that decision, but it was withdrawn on 6 February 2007. It is stated that his appeal rights were exhausted on the 7th of February 2007.

6. The appellant lodged further submissions on 2 June 2019 which were accepted as a fresh claim but refused in a decision letter of 18 February 2010.

7. The appellant appealed this decision, but it was dismissed on 19 April 2010 by an Immigration Judge (Judge Hindson).

8. The appellant's account before Judge Hindson was summarised at paragraph [20] of the FtTJ's decision as follows:

> "The appellant's father was a local commander for the Hezbi Islami; he was himself a supporter from age 15 and a member from age 17. He was involved in recruiting others and intimidating those that oppose the party. He fought in 2 battles, one against the Taleban, the other against Jamiat Islami.
>
> In September 2002 or 2003 he was away from home gathering wood when his home was attacked and his parents, brother and sister were all killed. He remained in the house for 2 days and was then told that Jamiat Islami had intended to kill him

to, and that they would return to do so. He fled the country with the help of his uncle. The journey took about 3 months. He was provided what he claims to be a newspaper extract reporting this incident.

He did not claim asylum because he did not know how to. He did so only after being arrested on suspicion of illegal entry, 3 or 4 years after arrival. On arrestee produced a forged Italian passport as evidence that he was in the UK legally. The appellant now claims that he did not instruct his solicitors to withdraw his previous appeal. He claims he has family and private life in the UK. His produced an arrest warrant which alleges fraudulent charges, and he will not get a fair trial."

9. Judge Hindson did not find the appellant to be a credible witness. The factual findings made by Judge Hindson are recorded in the decision letter as follows:
   (1) the appellant is a citizen of Afghanistan.
   (2) He has not been involved as a supporter or member of Hezbi Islami.
   (3) He has not been involved in fighting with Jamet Islami.
   (4) He is of no interest to the authorities of any terrorist group in Afghanistan.
   (5) He is not at risk of harm on return to Afghanistan.
   (6) He is not established there is a real risk of a breach of his article 3 rights in the event of return to Afghanistan.

10. The Judge therefore dismissed the appeal in his decision promulgated on 19 April 2010. The appellant remained in the United Kingdom. He lodged further submissions on 7 November 2017 which were accepted as a fresh claim and were the subject of the decision taken by the respondent on the 11 October 2019.

11. The appellant provided a number of new documents in respect of his fresh claim which consisted of a witness statement dated 1/8/17, 4 death certificates, 4 post-mortem documents, a copy of a police report with translation, membership card for Hezbi Islami, psychiatric report dated 5/8/2016, letter of support from a counsellor, letter from support from senior imam and letters of support from friends in the United Kingdom.

12. It was submitted on behalf of the appellant that he would be at risk of harm from factions of the Jamiat Islami who were responsible for the death of his family members in Afghanistan before he left. It was further stated that the appellant did not have access to the documents at the time of the 1st decision as he was not in contact with anyone at that time. The appellant's case in detail was set out in the witness statement dated 6 August 2017.

13. Whilst the fresh claim was made in 2017 the decision by the respondent was not made until the 11 October 2019. The respondent refused his protection and human rights claim.

14. The decision letter recited the basis of his claim that he could not return to Afghanistan as he would be persecuted by those who had killed his family. He claimed that despite the passage of time since he left, he would be subject to serious harm or violence such as to engage Articles 2 and 3 of the ECHR and in addition he claimed to suffer from mental health issues which also meant he was unable to return to Afghanistan. The appellant further claimed to have established a private life whilst in the United Kingdom and that removal would be a direct breach of Article 8.

15. The respondent considered the appellant's fresh claim in the context of the previous decision of Judge Hindson set out at paragraphs [13] – 19] applying the principles in Devaseelan. The respondent set out the findings of fact made that the appellant had not been involved as a supporter or member of Hezbi Islami , he had not been involved in fighting with that party or the Taliban and was of no interest to the authorities or any terrorist group in that country. It was further noted at paragraph 19 that the judge had found that his claim was inconsistent and that he had not been accepted as a credible witness.

16. Against that background the respondent considered the documentation that had been subsequently provided for the fresh claim and recited at paragraph [22] of the decision letter. The respondent considered them in in line with the decision of Tanveer Ahmed [2002] UKIAT 00439 but reached the conclusion that the documents did not undermine the previous findings made by the immigration judge. The respondent also considered the psychiatric report and whilst it was accepted that the appellant may be displaying symptoms of PTSD and depression, it was not accepted that the doctor could confirm they had been derived from his experiences in Afghanistan. Whilst it is not in dispute he was suffering from PTSD; it was not considered that it supported his original account which had been previously dismissed by the immigration judge.

17. At paragraphs 37 – 47, the respondent considered Article 15 ( c) in the light of the CPIN Afghanistan: security and humanitarian situation July 2019, and in conclusion that indiscriminate violence would not be at such a high level that it represented in general a real risk of harm contrary to Article 15 (c ).

18. At paragraphs 49 – 61, the respondent addressed the issue of internal relocation to Kabul in line with the CPIN dated July 2019 and in the light of the CG decision of AS (safety of Kabul) Afghanistan CG [2018] UKUT 118. The respondent concluded that the appellant could return to Kabul as he was still in contact with family members in Afghanistan and thus had a family network who could assist him. He was a healthy young man with an option of family support and therefore could relocate.

19. As to Article 8, the respondent did not consider that the appellant could meet the requirements of paragraph 276ADE and that there would be no significant obstacles to his integration to Afghanistan having been born there and spent the 1st 26 years of his life. He would be familiar with the language and customs. He retained family members in Afghanistan who could assist and provide support for his mental health.

20. At paragraphs 81 – 86 the decision considered under the heading "exceptional circumstances" an Article 8 medical claim but concluded that whilst he had established a private life over the last 17 years it was not so significant to have a detrimental impact on his medical condition. It was also concluded that there were facilities in Afghanistan capable of treating his illnesses. Article 3 (medical) was also considered at paragraphs 90 – 114 where the respondent concluded that the background evidence demonstrated there were facilities in Afghanistan where he could receive adequate treatment for mental health issues. The respondent therefore refused his claim.

21. The appellant appealed that decision, and it came before the FtT on 25 January 2021. In a decision promulgated on 16 February 2021 the FtTJ dismissed his appeal on protection and on human rights grounds.

22. The FtTJ began his assessment by setting out that it was agreed that the appellant's credibility was central to the asylum claim but that both parties accepted that the claim did not engage Article 15 (c) of the Qualification Directive. The judge began his assessment by setting out the previous findings made by the immigration judge (at paragraph [22]) and set out the fresh evidence relied upon by the appellant as set out in his witness statement and the grounds of appeal (paragraphs 23 – 26) and the fresh documentation and that the appellant's case was that the previous findings of fact were no longer sustainable in the light of the new evidence.

23. The judge then addressed the evidence. In respect of the psychiatric report, the judge concluded that the report did not state definitively that the appellant was suffering from PTSD and that he expressed an "opinion" rather than providing a definite diagnosis. There was no indication in the report that it affected his ability to give a coherent reliable account of his claim or to obtain documents and there was no indication in the report that any level of PTSD would prevent the appellant from finding or undertaking employment or work or supporting himself. The judge also found that the opinion was predicated on the appellant's own account. As to the other documentation including a newspaper article, post-mortem reports, death certificates, police report and ID card the judge set out his reasons for placing no weight on those documents. The judge

concluded that the appellant had failed to show that he was a credible and reliable witness and thus found that he was not at risk on return.

24. As to Articles 2 and 3, the judge concluded the appellant failed to show that he would be physically and/or mentally unfit to work on removal to Kabul. As to Article 8, the judge concluded that the appellant never had any leave to enter and remain in any friendships that were made during that period could only be given limited weight. There was no family life which could be engaged on Article 8 grounds.

25. The FtTJ therefore dismissed the appeal on both asylum and human rights grounds.

The Appeal before the Upper Tribunal:

26. The appellant sought permission to appeal that decision citing 5 grounds of appeal and permission was granted on 19 March 2021 by Judge Swaney.

27. Ground 1: asserts that the FtTJ erred in law in failing to properly consider the medical evidence.

    Ground 2: challenges the evaluation of the newspaper article.

    Ground 3: challenges the evaluation of the post-mortem reports

    Ground 4: asserts that the FtTJ erred in law by failing to consider the issue of internal relocation in the context of family support and the medical evidence.

    Ground 5: refers to the appellant's exceptional circumstances, consideration discretionary leave and that the FtTJ erred in law by failing to properly consider proportionality.

28. The appellant was represented by Ms Cleghorn of Counsel who acted by way of Direct Access. The respondent was represented by Mr Diwnycz, Senior Home Office Presenting Officer.

29. An application was made by Mr Diwnycz for an adjournment as set out in a letter to the Tribunal. It was stated "that the SSHD continues to aver that her position in respect of Afghanistan and the risk factors affecting those applying for protection, is not delineated in published policy. That she requires time to grasp the situation on the ground which is still in flux. Although the Taliban have taken de-facto control over the government of Afghanistan, that the situation resulting is not clear and neither are the risks therein.

30. The Secretary of State accepts the Taliban has taken back control of the majority of the country, including Kabul, however what this means in terms of the risk on return for those currently seeking asylum in the UK is unclear. Given the fluidity of the situation on the ground at

present it will be difficult for both parties to provide the Tribunal with accurate information with which to come to a decision in the coming days. In these circumstances the Respondent respectfully requests that the Tribunal adjourns this appeal for a 4 – week period to allow both parties time to assess the situation and submit additional evidence in light of this fundamental change in country circumstances. It will also allow the Respondent to review her policy position on Afghan asylum cases."

31. Ms Cleghorn objected to the appeal being adjourned given that this was an error of law hearing and that the circumstances that were relevant with those at the time of the decision.

32. I refused the application for an adjournment. The issue that the tribunal was to consider was whether the judge erred in law based on the material before him at the time of his decision. The grounds seek to challenge that evidence. On that basis, it seems to me that the appeal should proceed and that any fresh evidence sought to be admitted by the respondent would be relevant to any re-making given the changing circumstances. I note that no further background country evidence had been provided on behalf of the appellant.

33. At the outset of the hearing, I was informed by Counsel that the parties had reached an agreement on part of the appeal. Mr Diwnycz stated that he did not rely on the Rule 24 response filed on behalf of the respondent in which it had been stated that there was no error of law in the decision on Article 8 grounds. Ms Cleghorn stated that both advocates agreed that the FtTJ erred in his consideration of Article 8 of the ECHR and that the decision clearly had set out the submission made that the appellant relied upon Article 8 based on the issue of whether there were very significant obstacles to his integration to Afghanistan alongside his lengthy period of residence in the UK and his mental health. In this context she pointed to paragraph 21 of the decision which set out the preliminary discussions. Ms Cleghorn told the tribunal that this was inconsistent with what had been stated at paragraphs 35 and 56 of the decision and that there had been no concession made that paragraph 276 ADE was not engaged. The record of proceedings also indicates that submissions had been made on behalf of the appellant that included paragraph 276 (1) (vi). Both advocates were in agreement that for the reasons set out in the grounds and articulated in the grant of permission the FtTJ erred in law in his consideration of Article 8.

34. Ms Cleghorn addressed the tribunal other issues and principally ground 1 which concerned the medical evidence. In her submissions, Ms Cleghorn referred to the FtTJ's assessment of the medical evidence and that the judge was in error by reaching the conclusion that the appellant was not suffering from PTSD. This was not in dispute in the decision letter and his assessment of the issue failed to take into account the appellant's evidence concerning contact with

other professionals since the report. He further submitted that there was no difference between the report setting out an "opinion" or a "diagnosis" and the judge was wrong to highlight such a difference. The judge also appeared to reject the report on the basis that it was based on the appellant's account.

35. Ms Cleghorn submitted that the judge's assessment of the medical evidence was focused on his conclusion that the appellant was not suffering from PTSD and that as he failed to obtain help that any diagnosis it had had "gone away". The assessment tied into his overall assessment of credibility and that once he decided that the appellant was not suffering from PTSD it would then colour the assessment of the rest of the evidence. She also submitted that he had not been treated as a vulnerable witness at the hearing.

36. Ms Cleghorn referred the tribunal to the decision letter and that the respondent had referred to return to Kabul. However he is not a single man in good health and that return had also not been considered in light of the appellant's circumstances.

37. Mr Diwnycz on behalf of the respondent submitted that he did not rely upon the rule 24 response. As to the medical evidence, he submitted that there was some traction in what Ms Cleghorn had submitted. In particular he accepted that the distinction between diagnosis and opinion was a moot point and that they were properly considered as interchangeable phrases. He accepted that the judge had undertaken an incomplete assessment and that a fresh report ought to be commissioned if the matter was to be remitted to the FtT.

38. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

39. In the light of the agreement reached by the advocates, it is accepted by the respondent that the FtTJ erred in law in his consideration of Article 8. As the grant of permission sets out at paragraphs 7 – 10, the FtTJ made no clear finding as to whether or not Article 8 was engaged despite the evidence of the appellant's length of residence and his ties to the United Kingdom. As a result, the judge did not carry out the 5 stage approach set out in Razgar, nor did he have regard to the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 relevant to the assessment of proportionality. In essence, there had been no Article 8 assessment undertaken.

40. As to the remaining issues, they centre around the consideration of the medical report. I have given careful consideration to the submissions of the advocates and have done so in the light of the decision of the FtTJ and the material that was before the tribunal.

41. The thrust of the submissions made by Ms Cleghorn is that the judge erred in his consideration of the medical evidence which provided a diagnosis of the appellant as suffering from PTSD. The FtTJ's conclusions on the report were set out at paragraphs 32 – 33. At paragraph 32, the judge concluded that the report did not state definitively that the appellant was suffering from PTSD in 2003, 2006 or 2016. He further stated at paragraph 32 "he expresses his "opinion" rather than providing a definite "diagnosis" of PTSD." He later found that the appellant did not require hospital admission "because he was not suffering from a severe case of PTSD".

42. Ms Cleghorn submits that the judge's conclusion that there was no proper evidence that he was suffering from PTSD at the date of the report was in error. She points to the FtTJ's use of the term "opinion" and that there is no difference between a "diagnosis" or an "opinion". Mr Diwnycz in his submissions agreed with Ms Cleghorn's submission where he stated that both could be viewed as "interchangeable phrases".

43. Therefore both advocates are in agreement that the FtTJ erred in his consideration of the medical evidence. I accept their submissions that there is no real difference between the term "opinion" and "diagnosis" and that the author of the report had made a diagnosis that at the date of the report the appellant was suffering from PTSD. The judge had earlier accepted that the author of the report was a relevant expert as a psychiatrist and had the requisite expertise (at [28]). Furthermore as Ms Cleghorn submits and as Mr Diwnycz accepted, the respondent proceeded on the basis that not only did the doctor have the relevant expertise (see paragraph 32 of the decision letter) but also that it was not in dispute that the appellant was suffering from PTSD (see paragraph 35). However the judge appeared to reach a different conclusion on both aspects and in this context I accept Ms Cleghorn's submission that it had not been expected to argue that point given the respondent's stance.

44. Furthermore I accept the submission made by Ms Cleghorn that the FtTJ's assessment at [31] did not take account of the appellant's evidence that he had been seeking treatment since the diagnosis but had not been able to do so due to the pandemic when his appointment had been cancelled. This evidence was given by the appellant in his oral testimony and recorded at [12]. This was relevant to the FtTJ's conclusion overall to both his protection and human rights claim and to his rejection of the contents of the report.

45. Ms Cleghorn also pointed to paragraph 33 and that the FtTJ appeared to reject the medical evidence. The judge stated, "it is not, in my judgement, in the doctors remit to question the appellant's account of his nightmares and flashbacks since 2003 and that is opinion that the appellant is suffering from PTSD is predicated on the appellant's own account." Again the advocates agree that the FtTJ erred in his

assessment of the medical evidence in this respect. In my view, it was open to the doctor to express an opinion as to the appellant's diagnosis from the account given to him by the appellant. Such an opinion may be based on the appellant's reported symptoms, including symptoms of mental health and/or of their overall presentation and history. Thus the rejection of the report on this basis was in error.

46. I accept the submission made that the FtTJ's assessment of the medical evidence was focused on the central plank that the appellant was not suffering from PTSD and that in reaching his decision the judge did not take into account the acceptance of that diagnosis by the respondent. The other errors identified also go to the core of the assessment.

47. Given the errors outlined above, it is now necessary for me to consider the relevance of the errors to the assessment of the evidence overall. The decision as to whether an account given by an appellant is truthful or credible is one to be taken by the tribunal on the totality of the evidence (applying the principles in Mibanga). If any part of the evidence is not properly considered as in the case of the medical evidence, this affects the overall assessment of the factual claim. Ms Cleghorn submitted that once the judge had rejected the medical evidence it affected his overall assessment of credibility, and this must also extend to the issue of risk. The medical evidence was also relevant to the protection claim.

48. The grounds of challenge set out a number of submissions relating to the FtTJ's assessment of the documents which were also relevant to the protection claim. Ms Cleghorn did not specifically address those documents, but they formed part of the appellant's core claim and the grounds. In my view, and having considered the written grounds, I see no error in considering the reliability of the documents in light of the background evidence as to the prevalence of the fraudulent documents (see paragraphs 42 and 430. However, I accept the written submissions that when evaluating the post-mortem reports the judge did so by reference to what appeared to be UK standards (see paragraph 37 where reference is made to whether there was a requirement in Afghanistan to name the perpetrator of the injuries) and at paragraph 39 the requirement of the listing of the injuries not being "methodically listed".

49. Having considered the submissions made in the light of the errors identified, I have reached the conclusion that the decision should be set aside in its entirety. In light of the errors of law identified and as accepted by Mr Diwnycz, they can been seen to have affected the overall assessment of the evidence. Ms Cleghorn pointed to the issues of risk on return at paragraph 32 where the judge concluded that even if he suffered PTSD it would not prevent the appellant from undertaking employment or supporting himself on return. However

the relevance of any diagnosis was not taken into account in assessing return to Kabul or in the context of his claim. Given the requirement for anxious scrutiny, I have reached the conclusion that the right outcome is to set aside the decision in its entirety.

50. As to the remaking of the decision, I heard from the advocates as to the course to take. Ms Cleghorn properly recognised that the disposal of the appeal would depend on the nature of the errors of law and the tribunal's view of them. Mr Diwnycz submitted that in his view the correct course would be to remit the appeal to the FtT given the medical evidence would require updating along with the country policy update to be provided by the respondent (which had formed the application for an adjournment).

51. I have considered the submissions of the parties and I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

52. In my judgement the appeal falls within subparagraph (b) as the judicial fact finding will be required on all issues, both protection and human rights claim. This will require the tribunal to hear the evidence and to consider the documentary evidence in its totality. It will be necessary to make factual findings as to the appellant circumstances including those relevant Afghanistan and also his personal circumstances. I therefore find that in light of those matters that it is consistent with the overriding objective to remit the case to the First-tier Tribunal for a fresh hearing with none of the findings to remain.

53. I note that Ms Cleghorn submitted that the appellant was not treated as a vulnerable witness at the hearing. I can see no reference to any representations made on behalf of the appellant to the FtTJ in this regard despite the decision in AM(Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 and the practice direction. This should be considered at any rehearing.

## Notice of Decision

I therefore set aside the decision of the FtTJ For the reasons given above, I am satisfied that the decision of the FtTJ involved the making of an error on a point of law and the decision of the FtT shall be set aside and remitted to the FtT for a hearing afresh.

Signed

Dated 12 October 2021

Upper Tribunal Judge Reeds

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.